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No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CONRAD MOCK and BARBARA MOCK
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION, FAIRNESS TO LAND OWNERS COMMITTEE, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF), *et al.*, respectfully move for leave to file the attached brief as amici curiae in

support of the Petition for Writ of Certiorari. Counsel for petitioners has consented to the filing of this brief; counsel for respondent has refused to consent, thereby necessitating the filing of this motion.

WLF is a national nonprofit public interest law and policy center with supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of restrictions imposed by regulatory authorities at the local, state, and federal level that either bar or impose conditions on the reasonable use and development of their property that implicate the Takings Clause of the Fifth Amendment of the U.S. Consitution.

WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Indeed, WLF's amicus brief in *Dolan* was cited favorably by counsel during the oral argument in that case for the basic principle ultimately adopted by the Court in its opinion, *i.e*, that a rough proportionality is required to be shown between the proposed governmental exactions and the impact of the development.

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. FLOC represents over 18,000 "mom and pop" members who are private propertyowners faced with confiscatory federal, state, and local land-use laws and regulations involving wetlands, endangered species, growth management, and other concerns.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land. FLOC is active in promoting balanced, fair, and environmentally sensitive legislation that protects property rights. FLOC's public education campaign emphasizes the difference between conservation and confiscation, and its officers and members have testified on numerous occasions before the Congress and state legislatures.

The Pennsylvania Landowners' Association, Inc. (PLA) is a not-for-profit corporation formed in 1987 and based in Waterford, Pennsylvania. PLA is the leading organization in Pennsylvania dedicated to the protection of property rights and economic opportunity while promoting responsible environmental stewardship. PLA has many members in Pennsylvania who are unable to make reasonable use of their land because of wetland restrictions.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy.

FLOC, PLA, and AEF, have also appeared before this Court as amici curiae in *Lucas* and *Dolan*.

Amici submit that the petition presents important issues that thousands of property owners across America face when they try to make reasonable use of their property. Amici can bring a broader perspective to the issues than that presented by the parties, and amici's participation in this case will assist this Court in determining whether to grant the petition.

For all the foregoing reasons, amici curiae WLF, *et al.*, respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The interests of amici curiae Washington Legal Foundation, *et al.*, are set out fully in the motion for leave to file accompanying this brief.

STATEMENT OF THE CASE

Petitioners are part owners of a vacant 5.2-acre parcel of land which they purchased in 1963. The land is located in Plumstead Township, Pennsylvania, and is zoned for commercial use, including the use of an automobile repair facility which the petitioners proposed to build. The record is clear that all of the parcels surrounding the Mocks' property are "highly developed with commercial and industrial establishments." Pet. App. 34a. Indeed, one such facility was built on totally filled wetlands *after* the Mocks' purchased their property. Pet. 3.

Petitioners' proposed construction of an automobile repair facility met the township requirements for stormwater management, floodplain use, and erosion and sedimentation control. Although approximately four acres or 80 percent of the parcel are classified as wetlands, petitioners' proposed use of the land would necessitate the filling of only .87 acres of the wetland portion of the parcel.[1] Significantly, there was no feasible way to use only the upland portions of the property for the project without impacting the same amount of wetlands.

Although the impact of the fill on the .87 acre wetland portion would appear to have been sufficiently mitigated by

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[1] This proposed design of the facility was essentially similar to that proffered by Midas Realty Corporation which offered to pay the Mocks $175,000 for the property contingent on obtaining the necessary permits. The Midas proposal was withdrawn when both the respondent and the U.S. Army Corps of Engineers objected to the filling of any wetland portion of the property. Pet. App. 36a.

petitioners' stormwater management plan, petitioners nevertheless offered, in light of the respondent's initial decision to deny the permit, to mitigate even further. Petitioners proposed (1) to deed-restrict the remaining wetlands, thereby preventing any future development; (2) to plant trees to create a buffer between the site and the remaining wetlands; and (3) to create a costly .38-acre wetland parcel, complete with wetland vegetation, on the rear upland section. Pet. App. 7a; 37a.

Nevertheless, the respondent, Pennsylvania Department of Environmental Resources (DER), issued a final denial of Mocks' application to fill in the small wetland area, without specifying what further exactions or either on-site or off-site mitigation would satisfy DER's concerns about the alleged impacts of the project on the environment.

On appeal from the denial of the fill permit, the Environmental Hearing Board (EHB) found that "without a permit to fill in a portion of the wetlands, [the site] is essentially valueless." Pet. App. 44a. Nevertheless, the EHB ruled on May 1, 1992, that the denial did not effectuate a taking of all or part of petitioners' property, speculating that other development of the property might be possible, which might impact less wetlands, and which might "induc[e] DER to issue a permit." Pet. App. 56a.

The Commonwealth Court of Pennsylvania agreed with the EHB that the land "in its present state is essentially valueless." Pet. App. 22a. However, the court concluded that the denial did not constitute a taking under either the Takings Clause of the Fifth Amendment or its state counterpart, Article I, Section 10 of the Pennsylvania Constitution, despite this Court's intervening decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886

(1992) (holding that a *per se* taking occurs when essentially all economically viable use of property is prohibited).

The Commonwealth Court speculated, as did the EHB, that there may be other uses of the property, such as the building of "museums, libraries, hospitals * * * service and retail shops, and restaurants." Pet. App. 18a.[2] Yet the uncontradicted evidence demonstrated that those proposed uses would entail filling wetlands in the same amount *and even more* than the automobile repair facility because of larger parking area requirements for those facilities. R. 102a (testimony of Russell Benner).

The Commonwealth Court also concluded that no taking occurred under the "traditional takings analysis" which, unlike the categorical finding of a taking, involves a weighing or balancing of several factors, *i.e.*, the character or type of the governmental interference, the diminution of the value of the property, and the extent to which the governmental action interferes with reasonable investment-backed expectations. With respect to the diminution of value, the court again speculated that there may be other uses of the property. The court discounted the Mocks' investment-backed expectations because the property was riparian land. On both these counts, the court rejected jurisprudence to the contrary from the U.S. Court of Federal Claims and Federal Circuit. Pet. App. 22a-25a. Judge James R. Kelley dissented, finding that the

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[2] The tax authorities were more realistic in their appraisal of the value of the property, having reduced the assessed value of the land almost 90 percent after the permit denial. Pet. App. 44a.

petitioners' property "was rendered economically valueless" and that *Lucas* was dispositive. Pet. App. 28a.

The Supreme Court of Pennsylvania affirmed without opinion the order of the Commonwealth Court.

REASONS FOR GRANTING THE WRIT

This case presents both procedural and substantive issues of exceptional importance to thousands of small property owners across America who face confiscatory restrictions, particularly wetland regulations, on their fundamental right to make reasonable and productive uses of their real property. The basic question is whether a taking of private property under the Fifth Amendment has occurred when a denial of a permit leaves the land essentially valueless, and whether the burden of proving otherwise should be shifted to the government.

Unfortunately, these everyday restrictions on small property owners are unlikely to be reviewed by this or any other court because the owners simply lack the resources to challenge these federal, state, and local regulatory restrictions, and the permitting authorities know it.

For those few property owners who do endeavor to vindicate their rights, cases such as this can easily take ten years or more to adjudicate through the costly administrative and judicial process, and that is *after* the permit has been denied. Wetland fill permit applications are filed and "preliminarily" denied; applicants are forced to hire expensive consultants to re-design the projects and offer mitigation to meet vague and unspecified concerns,

only to have these modified proposals rejected, and so on as the process continues back and forth.[3]

Accordingly, this case presents the Court with a rare but excellent opportunity to clarify its takings jurisprudence which has been misconstrued by lower courts and to give much needed guidance to both permitting authorities and property owners.

This petition should also be granted because the lower court decision radically departed from this Court's decision in *Lucas* when it ruled that there was no categorical takings, and erred as well as in its alternative ruling that no taking occurred under *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). In doing so, the Commonwealth Court also rejected, and thus, is in conflict with, compelling takings jurisprudence from the U.S. Court of Federal Claims and the Federal Circuit, both of which certainly have more expertise in this area of the law than do the courts below.

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[3] This case began in February 1986 when Midas filed the original permit application. Pet. App. 35a. The denial of the wetland fill permit application in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) occurred in 1982, but the case was not finally adjudicated until 12 years later.

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S TAKINGS JURISPRUDENCE IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* AND WITH THE FEDERAL CIRCUIT'S DECISION IN *LOVELADIES HARBOR, INC. V. U.S.*, THEREBY WARRANTING REVIEW UNDER SUPREME COURT RULES 10(c) AND 10(b).

Just as David Lucas did, the Mocks purchased an empty lot with the expectation of developing their property in accordance with applicable zoning regulations. At the time plans were made to develop their land, the properties surrounding both Mr. Lucas' and the Mocks' lots were already developed in the same manner proposed by the respective owners, *i.e.*, residences in the case of Mr. Lucas, and commercial structures in the case of the Mocks.

The land-use restriction on Mr. Lucas' property was found on its face by this Court to constitute a categorical taking because it denied the owner essentially all "economically beneficial use of land." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 (1992). The land-use restriction in this case as applied was found by the court below to render Mocks' property "essentially valueless."

Yet the Mocks were improperly denied the benefit of this Court's categorical ruling in *Lucas*, because the lower court speculated that there may be other uses of the property. But those other supposed uses would also require the filling of the same, if not more, wetland areas. Under those circumstances, a categorical taking has occurred, unless the proposed use of the property would constitute a nuisance, which it assuredly would not.

Accordingly, amici submit that the petition should be granted under Sup. Ct. Rule 10(c) because the state court "has decided a federal question in a way that conflicts with applicable decisions of this Court."

Amici further submit that this case is also indistinguishable from the facts in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). In that as-applied regulatory takings case, the Federal Circuit applied this Court's categorical rule in *Lucas* to the situation where, as here, a wetland fill permit was denied, thereby rendering the property essentially valueless. The Federal Circuit concluded that a compensable taking had occurred. *See also Formanek v. United States*, 26 Cl. Ct. 332 (1992). However, the majority opinion below erroneously rejected the applicability of *Loveladies* and *Formanek*. These decisions were rendered by courts which amici submit have more expertise than the Pennsylvania courts in takings jurisprudence, especially because they are essentially the only federal courts that decide takings cases.

The court below rejected *Loveladies Harbor, Inc.*, and *Formanek* on the grounds that the reasoning in those decisions -- which rely on the differential in the value of the property with and without the land-use restrictions -- "has not been adopted by the United States Supreme Court." Pet. App. 25a. Rather, the court below chose instead to rely primarily on this Court's decision in *Andrus v. Allard*, 444 U.S. 51 (1979) for the proposition that denial of substantial economic value does not constitute a taking. Pet. App. at 21a, 25a.

The lower court's reliance on *Andrus* is misplaced for several reasons. Most importantly, this Court in *Lucas*

limited the applicability of *Andrus* to personal property, rather than to real property cases:

> [I]n the case of *personal property*, by reason of the State's traditionally high degree of control over commercial dealings, [the property's owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). *In the case of land, however*, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

112 S. Ct. at 2889-90 (footnote omitted) (emphasis added).

With respect to the use of real property, this Court has always expressed its "abiding concern for the productive use of, and economic investment in, land." *Lucas*, *supra*, at 2895, n.8; *id.* at 2893 ("economically beneficial or productive use of land").

Furthermore, the use proposed by the Mocks for their property hardly constitutes the highest or best use of their property. Their proposal is quite modest; they wish to use approximately only one acre of their five-acre tract, and have offered to deed-restrict almost three-acres of wetlands which is tantamount to giving the government a conservation easement on their property.

If the Pennsylvania Department of Environmental Resources had instead given the Mocks a wetland fill permit, but the federal government (which has concurrent jurisdiction over wetlands) had refused, then petitioners' inverse condemnation claim would likely have been favorably decided in the U.S. Court of Federal Claims under *Loveladies Harbor*. The redress of important constitutional rights should not be so dependent upon the fortuity of the judicial forum in which a property owner finds his or her case.

Supreme Court Rule 10(b) states that one of the reasons for deciding whether to grant a petition for writ of certiorari is when "a state court of last resort has decided a federal question in a way that conflicts with the decision of another court of last resort or of a United States court of appeals." Amici submit that the Supreme Court of Pennsylvania, by affirming the Commonwealth Court, has decided an important federal question that conflicts with the United States Court of Appeals for the Federal Circuit, as even acknowledged by the Commonwealth Court. The conflict is not simply with any court of appeals, but the very one Congress has selected to adjudicate these kinds of cases.[4]

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[4] The decision below is also inconsistent with the forceful decision in *Morris County Land Improvement Co. v. Parsippany Troy Hills Township*, 40 N.J. 539, 552-553, 193 A.2d 232, 239 (1963) (law prohibiting filling of wetlands except under "exceedingly difficult conditions" constituted a taking). *Morris County* was cited favorably in *Lucas*, 112 S.Ct. at 2895.

II. THE BURDEN OF PERSUASION AND PROOF SHOULD SHIFT TO THE GOVERNMENT TO DEMONSTRATE WHAT ECONOMICALLY PRODUCTIVE USES CAN BE MADE OF THE PROPERTY, REGARDLESS OF WHETHER A TAKINGS CHALLENGE IS ADJUDICATED UNDER THE CATEGORICAL RULE IN *LUCAS* OR THE TRADITIONAL TAKINGS ANALYSIS IN *PENN CENTRAL*.

Essentially, the court below and many other courts have allowed federal and state regulatory authorities to deny property owners the right to make reasonable use of their property without a finding of a taking, because there is always some hypothetical and unspecified use of the property. That excuse is often unfairly used to justify either a refusal to hear a takings challenge because it is unripe, or to deny the takings claim on the merits because the property owner has not proven that every conceivable use of the property would be foreclosed by application of the land-use restriction. *See* Pet. App. 18a, 22a ("we accept the board's finding that the land in its present [wetland] state is essentially valueless * * * [but] there is no evidence in the record that the land cannot be put to economically viable use.").

The property owner is forced to play a costly guessing game with the authorities: what mitigation efforts would satisfy the authorities and what economically viable use of the property can be made? The authorities have absolutely no incentive to answer these questions. They assume no burden of having to show what economically viable use of the property can be made, thereby leaving the status of the property in a state of limbo, precisely where they want it.

The owner cannot sell the property because of the uncertain cloud on the property due to the presence of wetlands. The inordinate delays and permit denials thus constitute a *de facto* conservation easement on the property without the government having to pay for it.

The petitioners should not be forced to make an infinite series of costly permit applications in the vain hope of establishing that all metaphysically conceivable uses of the land have been precluded. Traditional zoning law does not place such a burden on the Mocks, however. *See, e.g., Ciba-Geigy Corporation v. Dover Township*, 553 A.2d 398, 404 (N.J. Super. 1988) (ordinance rezoning a hazardous waste site to a "preservation reclamation" zone held a taking because it did not accord the property owners a reasonable use permitted by right).

By having a permit denied, and by showing that the denial renders the property economically useless, the property owner has made a prima facie case of a categorical taking under *Lucas*. At that point, the burden should shift to the government of showing that either the proposed use constitutes a nuisance, or that other economically viable uses can be made of the property.

Given the permitting agency's alleged competence in this field, it is reasonable to shift to the agency the burden of going forward with a description and quantification of the interests concerned, the manner in which the Mocks proposed use of their land will interfere with those interests, and what the Mocks may do to accommodate the Commonwealth's interest while still retaining economically productive use of the land. See C. McCormick, *McCormick On Evidence* § 338 (3d ed. 1984); *id.* § 318 ("where facts pleaded by one party lie peculiarly in the

knowledge of the adversary, the latter has the burden of proving it").

This Court similarly shifted the burden to the government in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) to demonstrate that development exactions are "roughly proportional" to the environmental impact the development would have on the site. At least in the *Dolan* context, property owners have the benefit of being told by the permitting agencies specifically what mitigation efforts would be required in order to develop their property. In such a case, the owner (and a court) can objectively determine whether there is a "rough proportionality" between those requirements and the impact of the project.

While an objective formula for balancing public and private interests in wetland cases may at times be difficult to achieve, common sense (and environmental science) tells us that the public interest in protecting a wetland that is classified as an unreclaimed borrow pit (*1902 Atlantic LTD v. Hudson*, 547 F. Supp. 1381 (E.D. Va. 1983) is significantly less than that in protecting a rare calcareous fen (*Beure'-Co. v. United States*, 16 Cl. Ct. 42 (1988)). In the instant case, the wetlands on the Mocks' property were found by the EHB not to be important ones. Pet. App. 51a.

In the instant case, the property owner is doubly burdened: the owner is not only not told in as objective a manner as possible what the agency believes the quantifiable impacts of the project are, but also is left to

guess at his or her peril what mitigation efforts would satisfy the permitting authorities.[5]

Accordingly, this Court should grant the petition to decide this important federal question that is present in almost every takings challenge.

III. THE COURT BELOW, AND OTHER FEDERAL AND STATE COURTS, HAVE MISAPPLIED THE INVESTMENT-BACKED EXPECTATIONS FACTOR IN DETERMINING WHETHER A TAKINGS HAS OCCURRED.

Amici submit that the court below and other courts have seriously misconstrued the reasonable investment-backed expectations factor that is referred to in this Court takings jurisprudence, and the relationship of that factor to the economic devaluation of the property due to the regulation or governmental restriction. For that reason

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[5] For example, if the principle concern is that the value of these particular wetlands serve to retain storm water, the owner can offer to build storm water detention basins equivalent to the capacity of the wetlands (which apparently was done in this case). In that regard, a simple one-for-one replacement value is not always necessary. Thus, the storm water value of the .83 acre of a wetland in this case could be compensated by a properly constructed detention basin that may be only one-fourth that size. If the concern is wildlife habitat, the permitting authority should be required to show what impact the fill would have on certain species, and whether that concern could be addressed by the owner, such as Mocks' proposed planting of trees and the creation of a .38 acre vegetated wetland.

alone, this Court should clarify the role of investment-backed expectations in takings cases.[6]

The lower court took the petitioners to task for not presenting evidence of what their investment-backed expectation were in 1963 when they purchased the property, and further indicated that the Mocks "could not reasonably expect to develop their land free from government regulation because it is riparian land, which has been subject to regulation for centuries * * * but is also within the 100-year floodplain, as designated by the local zoning ordinance." Pet. App. 23a.

The EHB's reliance in this regard on *White v. Pennsylvania R. Co.*, 354 Pa. 397, 47 A.2d 200 (1946) was misplaced. Pet. App. 55a. *White* was concerned with the alteration of the flow of water contained within a defined channel. In this case, the project would not alter the flow of Pine Run Creek meandering through the northern boundary of Mocks' property. A more relevant authority is *Ridgeway Court, Inc. v. Landon Courts, Inc.* 442 A.2d 246 (Pa. Super. Ct. 1981) which dealt with the liability of landowner to neighbors for flooding due to the diversion of surface waters incident to ordinary development.

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[6] *See* D. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 The Urban Lawyer 215 (Spring 1995) ("Unfortunately, the Court is confused about the meaning of [investment-backed expectations], federal and state courts divide on how to apply it, and its role in taking law remains a puzzle.").

> One may make improvements upon his own land, especially in the development of urban property, grade it, and built [sic] upon it, *without liability for an incidental effect upon adjoining property even though there may result some additional flow of surface water thereon through a natural watercourse*, but he may not, by artificial means, gather the water into a body and precipitate it upon his neighbor's property.

442 A.2d at 247-48 (citing *Rau v. Wilden Acres*, 376 Pa. 493, 103 A.2d 422 (1954) (emphasis added). Other authority acknowledge the right of a property owner to the "rational, proper and profitable use" of land within the context of surface water rights. *See, e.g., Markle v. Grothe*, 156 A. 585, 586 (Pa. Super. Ct. 1931).

Pennsylvania, as do many other states, follows the civil rule with respect to surface waters. In addition, it is said that an individual may grade land and clear it of brush and trees to render it suitable for cultivation or for development. *Tess v. Charlerri Home Bldg. Co.*, 96 Pa. Super. Ct. 505 (1929). The common law courts of Pennsylvania thus have long recognized the right of property owners such as the Mocks to develop their property for the "natural uses" which are the "common and necessary use" of the land. *E.g., Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951).

The right to build on one's own land is an important right under common law in most if not all states. *See, e.g., Bostock v. Sams*, 52 A. 665 (Md. 1902); Anderson, 3 *American Law of Zoning*, 20.56 at 292 (3d ed. 1986)("[a] landowner has the right to develop his land; he is not required to sell it."). As one court aptly put it:

> True, a line always exist beyond which the erection of a dwelling, or place of business * * * may become detrimental to the general welfare, but in such cases the municipality is bound to compensate the owner if it proposes, in the public interest, to bar his property from any practical use for which it might be suited. It cannot compel him to sell it to an adjoining owner nor can it require him to purchase additional contiguous property, if it is available. Rather, it must itself acquire the property by purchase or condemnation since, in effect, it is a taking for a public purpose.

Long Island Land Research Bureau v. Young, 159 N.Y.S.2d 414, 417 (Sup. Ct. 1957).

In short, a property owner has the same right to use his land as his neighbors. In this case, all of the property adjacent to petitioners' lot has been commercially developed; indeed, the adjacent medical facility was built totally on wetlands *after* the Mocks purchased their lot.

While some have suggested that the common law cannot be frozen in its 19th century incarnation, it is also true that not every aspect of society has changed. There is, in other words, still good reason to be concerned about the rights of homeowners, shop keepers, and small businessmen. In that regard, the Mocks' modest plan to build an automobile repair shop on their property is nothing more than a 20th century version of the livery stable.

Significantly, the Mocks' proposed project satisfied all riparian and floodplain concerns. The denial of the permit was based solely on DER's wetland regulations which are of recent vintage. The government should not be allowed

to piggy-back a post-purchase regulatory scheme that is confiscatory in nature on top of a pre-purchase regulatory scheme whose conditions have been met or could be foreseeably met, and then argue that the later-imposed confiscatory scheme justifiably diminishes the property owners' investment-backed expectations.

Petitioners' general investment expectations in 1963 when they purchased the commercially developable lot became more reasonable, not less, as adjacent commercial development progressed over the last 30 years.

Secondly, even if the wetland restrictions existed before the Mocks' purchased their property, clearly that would not defeat an inverse condemnation claim. A similar argument was made and rejected in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) where the Court, noting the difference in the analysis between the personal property and real property, stated, "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in the conveying the lot." *Id.* at 833, n.2.

If the law were otherwise, the government would always be free to impose confiscatory regulations and take the property of all those who failed to challenge the regulation within the statute of limitations or prior to transferring the property either by sale, gift, or devise.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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